Re Ong Keh Keong; ex parte Pan Malaysian Enterprises Sdn Bhd (in liquidation)

HIGH COURT (KUALA LUMPUR) — BANKRUPTCY NO WA-29NCC-1198–11 OF 2021
AZLAN SULAIMAN JC
12 APRIL 2022

Bankruptcy — Proceedings — Application for leave — Judgment creditor filed bankruptcy notice and then filed application for leave to commence bankruptcy proceedings and/or to issue bankruptcy notice against judgment debtor — Judgment creditor's application allowed — Appeal against decision — Whether judgment creditor's application ought to be allowed

The judgment creditor Pan Malaysian Enterprises Sdn Bhd (in liquidation) ('the JC'), appointed Ong Partnership ('the firm') to represent it in the purchase of a plot of land in Kuala Lumpur. The JC deposited the differential sum of RM650,000 with the firm, but when the JC changed solicitors, requested the firm to remit it to the new solicitors, the firm failed to do. That led to the JC filing a suit against the firm to recover that money. When the firm failed to file its defence, the JC obtained a judgment in default ('the first JID'). However, on the firm's appeal, the first JID was set aside, and the firm was directed to file its defence. When the firm again failed to file its defence, the JC obtained a second judgment in default against the firm ('the second JID'). The firm's attempts to set aside the second JID were all dismissed by the sessions court, the High Court and the Court of Appeal. Based on the second JID, the JC filed a bankruptcy notice ('the first BN') against Ong Keh Keong ie the judgment debtor ('JD') as a partner of the firm, and the JD applied to set it aside. Though initially unsuccessful in the High Court, the JD prevailed in setting aside the first BN in his appeal to the Court of Appeal. The JC filed a fresh bankruptcy notice in this action against the JD ('the second BN') and filed an application for leave to commence bankruptcy proceedings and/or to issue a bankruptcy notice against the JD based on the second JID, on the ground that the JD was and was a partner/sole proprietor of the firm ('the JC's application'). Contrary to the court's directions for the filing of affidavits on the JC's application, the JD filed a second affidavit. The JC objected to it. At the hearing of the JC's application, the senior assistant registrar upheld the JC's objection, rejected the JD's second affidavit, and allowed the JC's application. Hence, this appeal. The JD advanced six grounds to oppose the JC's application: (i) the second JID was not a final judgment that could be executed/enforced; (ii) the JC failed to adduce or exhibit the order of the Court of Appeal on the dismissal of his appeal to set aside the second JID; (iii) the counterclaim for a sum of RM1,680,470.65, which exceeded the judgment sum of RM650,000 against

the firm, and therefore the JC could not issue a bankruptcy notice against him; (iv) since the first BN was ordered set aside by the Court of Appeal, on the doctrine of res judicata the JC was estopped from issuing any further BN against him; (v) the senior assistant registrar erred in rejecting his second affidavit opposing the JC's application; and (vi) under O 77 r 4 of the Rules of Court, the JC should have applied for leave before filing the second BN.

Held, allowing the appeal:

(1) The second JID was a final judgment. It was subsisting and had not been set aside. The JD's attempts to set it aside in the sessions court, the High Court and the Court of Appeal had all failed and he did not take it further. The JC's omission to adduce or exhibit the order of the Court of Appeal on the dismissal of the JD's appeal to set aside the second JID, was immaterial. Next, it was not a case that the firm could not set up the counterclaim; it was a case of the firm by its own neglect and/or default in failing to file a defence and/or counterclaim that disabled itself from setting up any defence or counterclaim. The firm had only itself to blame, and surely could not seek to benefit or take advantage of its own folly or failure. Further, the firm did not even have a counterclaim, set off or cross-demand equal to or exceeding the amount of the second JID. The doctrine of res judicata would not apply, because there was no adjudication on the merits of the bankruptcy action. Since the second JID remained valid and unsatisfied, the setting aside of the first BN would not amount to res judicata to estop the JC from filing the second BN. Regarding the fifth ground, the JD's second affidavit more or less repeated and did not add anything to what the JD said in his first affidavit opposing the JC's affidavit. Therefore, these grounds failed to oppose the JC's application (see paras 12–13, 17, 19, 31 & 33).

(2) For the JC's application, the JC invoked O 77 r 5(4) of the Rules of Court 2012 and r 89(4) of the Insolvency Rules 2017 where the JC was required to obtain leave of the court to pursue bankruptcy proceedings against the JD. The JC filed the second BN and then applied for that leave. In every case where the rules required leave to be obtained, that leave was mandatory. And it must be applied for and obtained first in time before the action for which leave was obtained was taken. On this ground, the JD succeeded in opposing the JC's application (see paras 35, 39–40 & 45).

[Bahasa Malaysia summary

Pemiutang penghakiman Pan Malaysian Enterprises Sdn Bhd (dalam likuidasi) ('JC'), melantik Ong Partnership ('firma') untuk mewakilinya dalam pembelian sebidang tanah di Kuala Lumpur. JC mendepositkan jumlah perbezaan RM650,000 dengan firma itu, tetapi apabila JC menukar peguamcara, meminta firma itu menyerahkannya kepada peguamcara baharu,

A firma itu gagal berbuat demikian. Ia menyebabkan JC memfailkan saman terhadap firma itu untuk mendapatkan semula wang itu. Apabila firma gagal memfailkan pembelaannya, JC memperoleh penghakiman ingkar ('JID pertama'). Walau bagaimanapun, atas rayuan firma itu, JID pertama telah diketepikan, dan firma itu diarahkan untuk memfailkan pembelaannya. B Apabila firma itu sekali lagi gagal memfailkan pembelaannya, JC memperoleh penghakiman ingkar kedua terhadap firma tersebut ('JID kedua'). Percubaan firma itu untuk mengetepikan JID kedua semuanya ditolak oleh mahkamah sesyen, Mahkamah Tinggi dan Mahkamah Rayuan. Berdasarkan JID kedua, C JC memfailkan notis kebankrapan ('BN pertama') terhadap Ong Keh Keong iaitu penghutang penghakiman ('JD') sebagai rakan kongsi firma itu, dan JD memohon untuk mengetepikannya. Walaupun pada mulanya tidak berjaya di Mahkamah Tinggi, JD berjaya mengetepikan BN pertama dalam rayuannya di Mahkamah Rayuan. JC memfailkan notis kebankrapan baharu dalam D tindakan ini terhadap JD ('BN kedua') dan memfailkan permohonan kebenaran untuk memulakan prosiding kebankrapan dan/atau mengeluarkan notis kebankrapan terhadap JD berdasarkan JID kedua, atas alasan bahawa JD adalah dan merupakan rakan kongsi/pemilik tunggal firma tersebut ('permohonan JC'). Bertentangan dengan arahan mahkamah untuk E memfailkan afidavit bagi permohonan JC, JD memfailkan afidavit kedua. JC membantahnya. Pada pendengaran permohonan JC, penolong pendaftar kanan mengekalkan bantahan JC, menolak afidavit kedua JD, dan membenarkan permohonan JC. Oleh itu, rayuan ini. JD mengemukakan enam alasan untuk menentang permohonan JC: (i) JID kedua bukanlah F penghakiman muktamad yang boleh dilaksanakan/dikuatkuasakan; (ii) JC gagal mengemukakan atau mengeksibitkan perintah Mahkamah Rayuan mengenai penolakan rayuannya untuk mengetepikan JID kedua; (iii) tuntutan balas berjumlah RM1,680,470.65, yang melebihi jumlah penghakiman RM650,000 terhadap firma itu, dan oleh itu JC tidak boleh mengeluarkan G notis kebankrapan terhadapnya; (iv) oleh kerana BN pertama diarahkan diketepikan oleh Mahkamah Rayuan, atas doktrin res judicata JC telah dihalang daripada mengeluarkan sebarang BN lagi terhadapnya; (v) penolong kanan pendaftar terkhilaf dalam menolak afidavit keduanya yang menentang permohonan JC; dan (vi) di bawah A 77 r 4 Kaedah-Kaedah Mahkamah, JC H sepatutnya memohon kebenaran sebelum memfailkan BN kedua.

Diputuskan, membenarkan rayuan:

(1) JID kedua adalah penghakiman muktamad. Ia masih wujud dan tidak diketepikan. Percubaan JD untuk mengetepikannya di mahkamah I sesyen, Mahkamah Tinggi dan Mahkamah Rayuan semuanya gagal dan dia tidak meneruskannya. Peninggalan JC untuk mengemukakan atau mengeksibitkan perintah Mahkamah Rayuan mengenai penolakan rayuan JD untuk mengetepikan JID kedua, adalah tidak material. Seterusnya, ia bukanlah satu kes bahawa firma itu tidak dapat

menyediakan tuntutan balas; ia adalah kes firma itu dengan pengabaian sendiri dan/atau lalai kerana gagal memfailkan pembelaan dan/atau tuntutan balas yang menghalang dirinya daripada menyediakan sebarang pembelaan atau tuntutan balas. Hanya firma itu perlu dipersalahkan, dan pastinya tidak boleh mencari manfaat atau mengambil kesempatan daripada kebodohan atau kegagalannya sendiri. Selanjutnya, firma itu tidak mempunyai tuntutan balas, penolakan atau tuntutan silang sama dengan atau melebihi jumlah JID kedua. Doktrin res judicata tidak akan terpakai, kerana tiada adjudikasi mengenai merit tindakan kebankrapan itu. Memandangkan JID kedua kekal sah dan masih belum dipenuhi, penepian BN pertama tidak akan menjadi res judicata untuk menghalang JC daripada memfailkan BN kedua. Berkenaan dengan alasan kelima, afidavit kedua JD lebih kurang berulang dan tidak menambah apa-apa apa yang JD katakan dalam afidavit pertamanya yang menentang afidavit JC. Oleh itu, alasan-alasan ini gagal untuk menentang permohonan JC (lihat perenggan 12–13, 17, 19, 31 & 33).

(2) Bagi permohonan JC, JC menggunakan A 77 k 5(4) Kaedah-Kaedah Mahkamah 2012 dan k 89(4) Kaedah-Kaedah Insolvensi 2017 di mana JC dikehendaki mendapatkan kebenaran mahkamah untuk meneruskan prosiding kebankrapan terhadap JD. JC memfailkan BN kedua dan kemudian memohon kebenaran itu. Dalam setiap kes di mana peraturan memerlukan kebenaran untuk diperolehi, kebenaran itu adalah wajib. Dan ia mesti dipohon dan diperolehi terlebih dahulu dalam masa sebelum tindakan yang diambil kebenaran itu diambil. Atas alasan ini, JD berjaya menentang permohonan JC (lihat perenggan 35, 39–40 & 45).]

Cases referred to

Bank Pertanian Malaysia Bhd v Amir Firdaus bin Nordin [2018] 5 MLJ 370; [2018] 8 CLJ 1, CA (refd)

Dr Shamsul Bahar bin Abdul Kadir v RHB Bank Bhd and another appeal [2015] 4 MLJ 1; [2015] 4 CLJ 561, FC (refd)

Hong Leong Bank Bhd v Khairulnizam bin Jamaludin [2016] 4 MLJ 302, FC (refd)

Kasturi Kesveren a/l Balasamy v Rui Development Sdn Bhd [2015] MLJU 1972; [2015] 4 CLJ 94, HC (refd)

Lee Choon Hei v Public Bank Bhd and another appeal [2017] 3 MLJ 441, CA (refd)

Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd [1996] 1 MLJ 30, FC (refd)

Legislation referred to

Insolvency Act 1967 ss 3(1)(i), 5(3)
Insolvency Rules 2017 rr 17, 89(4)

A Limitation Act 1953 s 6(1)
Rules of Court 2012 O 46 r 2(1)(a), O 77, O 77 r 4, O 77 r 5(4), (5)

Sean Tan (with Jesselyn Tham) (Thomas Philip) for the judgment creditor.
Ong Keh Keong (Ong Partnership) for the judgment debtor.

B

Azlan Sulaiman JC:

OVERVIEW

C **[1]** On 19 December 2016, Pan Malaysian Enterprises Sdn Bhd (in liquidation) ('the JC') obtained a judgment in default of defence against the firm of Ong Partnership ('the firm'). In this bankruptcy action, the JC filed a bankruptcy notice against the JD on 17 November 2021 and on 22 November 2021 filed an application ('the JC's application') for leave to commence D bankruptcy proceedings and/or to issue a bankruptcy notice against the JD based on that judgment in default, on the ground that the JD was and is a partner/sole proprietor of the firm. On 7 February 2020, the senior assistant registrar allowed the JC's application, and the JD now appeals that decision.

E SALIENT BACKGROUND FACTS

[2] The history of this case in reality goes back over a decade. In November 2011, the JC appointed the firm to represent it in the purchase of a plot of land in Kuala Lumpur. The JC deposited the differential sum of RM650,000 with F the firm, but when the JC changed solicitors, requested the firm to remit it to the new solicitors, which the firm failed to do. That led to the JC filing Kuala Lumpur Sessions Court Summons No 852-NCvC-386–12 of 2014 against the firm ('the civil suit') to recover that money.

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[3] When the firm failed to file its defence, the JC obtained a judgment in default on 16 June 2015 ('the first JID'). However, on the firm's appeal, the first JID was set aside on 18 March 2016, and the firm was directed to file its defence. When the firm again failed to file its defence, the JC obtained a second H judgment in default against the firm, on 19 December 2016 ('the second JID').

[4] The firm's attempts to set aside the second JID were all dismissed by the sessions court, the High Court and the Court of Appeal on 7 March 2017, 23 March 2018 and 23 January 2019, respectively.

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[5] Based on the second JID, the JC filed a bankruptcy notice dated 25 March 2019 in Kuala Lumpur High Court Bankruptcy No WA-29NCC-910–03 of 2019 ('the first BN') against the JD as a partner of the firm, and the JD applied to set it aside. Though initially unsuccessful in the

High Court, the JD prevailed in setting aside the first BN on 13 April 2011, in his appeal to the Court of Appeal by Civil Appeal No W-03(1M)(NCC)-1–01 of 2020.

[6] On 17 November 2021, the JC filed a fresh bankruptcy notice in this action against the JD ('the second BN'), and on 22 November 2021 filed the JC's application, invoking rr 17 and 89(4) of the Insolvency Rules 2017 and/or O 77 r 5(4) of the Rules of Court 2012 and/or under the inherent jurisdiction of the court.

[7] Contrary to the court's directions for the filing of affidavits on the JC's application, the JD filed a second affidavit. The JC objected to it. At the hearing of the JC's application, the senior assistant registrar upheld the JC's objection, rejected the JD's second affidavit, and allowed the JC's application.

[8] This is the resulting appeal. Even though it is an appeal, it is by way of a rehearing of the JC's application (see *Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30).

THE JD'S GROUNDS OF OBJECTION/APPEAL

[9] The JD advances six grounds to oppose the JC application:

(1) the second JID is not a final judgment that can be executed/enforced;

(2) the JC failed to adduce or exhibit the order of the Court of Appeal on the dismissal of his appeal to set aside the second JID;

(3) the firm has a valid counterclaim for a sum of RM1,680,470.65, which exceeds the judgment sum of RM650,000 against the firm, and therefore the JC cannot issue a bankruptcy notice against him. By this, the JD says that the firm satisfies the court that it has a counterclaim, set off or cross-demand which equals or exceeds the amount of the judgment debt under s 3(1)(i) of the Insolvency Act 1967;

(4) since the first BN was ordered set aside by the Court of Appeal, on the doctrine of res judicata the JC is estopped from issuing any further BN against him;

(5) the senior assistant registrar erred in rejecting his second affidavit opposing the JC's application (encl 13); and

(6) under O 77 r 4 of the Rules of Court, the JC should have applied for leave before filing the second BN.

[10] In *Lee Choon Hei v Public Bank Bhd and another appeal* [2017] 3 MLJ 441, Harmindar Singh JCA (as His Lordship then was) said of an application

under O 77 of the Rules of Court 2012:

> In any event, the relevant part of O 77 r 5(5) provides that ' ... where that person disputes liability, the court may order that the liability of that person be tried and determined in any manner in which any issue or question in any action may be tried and determined'. This must be read together with O 77 rr 1 and 5(4). When read together we agree that O 77 r 5(4) is a secondary proceeding after judgment is taken against the firm, whereby the only thing that the applicant needs to show is that the subject of the application 'is liable to satisfy the judgment or order as being a member of the firm'.
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> It must follow that the plaintiff does not need to prove all over again all the causes of action that are merged in the judgment against the firm because the nexus between the appellant and the judgment is the all-important fact that the appellant was a member of the firm at the time when the plaintiff's cause of action accrued against the firm. Thus, as soon as the plaintiff shows that the appellant was a member of the firm when the cause of action accrued, the appellant is liable.

[11] By that decision, the JD's grounds (1) to (4) above would fall out of the purview of deciding the JC's application since they relate more to grounds for challenging the bankruptcy notice. Nevertheless, since the JD has raised them, I will consider and decide them.

Ground 1: Whether the second JID is a final judgment that can be executed/enforced

[12] In my view, the second JID is a final judgment. It is subsisting and has not been set aside. The JD's attempts to set it aside in the sessions court, the High Court and the Court of Appeal had all failed and he did not take it further. In other words, he has exhausted all avenues of appeal.

Ground 2: The effect of the JC's failure to adduce or exhibit the order of the Court of Appeal on the dismissal of the JD's appeal to set aside the second JID

[13] The JC's omission to adduce or exhibit the order of the Court of Appeal on the dismissal of the JD's appeal to set aside the second JID, was immaterial. The JD knew exactly what that order was because it was made on his appeal.

[14] So, this ground also fails.

Ground 3: Whether the firm has a valid counterclaim for a sum of RM1,680,470.65, which is much more than the judgment sum of RM650,000 against the JC, and therefore the JC cannot issue a bankruptcy notice against him

[15] Section 3(1)(i) of the Insolvency Act 1967 provides:

A debtor commits an act of bankruptcy if a creditor has obtained a final judgment or final order against him for any amount and execution thereon not having been stayed has served on him in Malaysia, or by leave of the court elsewhere, a bankruptcy notice under this Act requiring him to pay the judgment debt or sum ordered to be paid in accordance with the terms of the judgment or order with interest quantified up to the date of issue of the bankruptcy notice, or to secure or compound for it to the satisfaction of the creditor or the court; and he does not within seven days after service of the notice in case the service is effected in Malaysia, and in case the service is effected elsewhere then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice or *satisfy the court that he has a counterclaim, set off or cross-demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid and which he could not set up in the action in which the judgment was obtained* or in the proceedings in which the order was obtained:

Provided that for the purposes of this paragraph and of section 5 any person who is for the time being entitled to enforce a final judgment or final order shall be deemed to be a creditor who has obtained a final judgment or final order. (Emphasis added.)

[16] There are two main reasons why I would reject this objection.

[17] Firstly, it is clear that under s 3(1)(i) the counterclaim must be one 'which he could not set up in the action in which the judgment was obtained'. In the civil suit, it was not a case that the firm could not set up the counterclaim; it was a case of the firm by its own neglect and/or default in failing to file a defence and/or counterclaim that disabled itself from setting up any defence or counterclaim. The firm has only itself to blame, and surely cannot seek to benefit or take advantage of its own folly or failure.

[18] Further, by having failed to set aside the second JID, the door is closed for them allege a defence and/or counterclaim to the JC's claim and to the judgment.

[19] Secondly, the JD's own evidence shows that the firm did not even have a counterclaim, set off or cross-demand equal to or exceeding the amount of the second JID.

[20] In para 7 of the JD's first affidavit opposing the JC's application (encl 7), the JD said the firm had 57 bills for outstanding legal fees totaling RM1,680,470.65 owing to the firm, as listed in the exhibit marked 'OKK1' ('the firm's list').

[21] I must make it clear that in no way am I saying that those bills or the claims for payment on those bills are valid. The firm's list and the matters listed therein are unproven.

[22] However, what is evident from the firm's list is that, of the 57 bills listed, only Nos 18–30 are alleged as being payable by JC, and were issued between 17 February 2012 to 23 March 2013. In fact, Bill Item No 20 is allegedly dated 17 February 2012, Bill Item No 30 is allegedly dated 22 February 2012, Bill Item No 29 is undated, and remaining ten are dated 22 March 2013. The other 44 bills on the firm's list were allegedly issued to other companies, ie legal entities separate and distinct from the JC. Thus, these other 44 bills can be discounted and ignored.

[23] My calculations of those 13 bills allegedly issued to the JC show a total of only RM276,869. This falls way short of the judgment sum of RM650,000 in the second JID because the list itself shows them as allegedly being due and owing to other legal entities, and not by the JC.

[24] Furthermore, as all 57 bills on the firm's list are circa 2010 to 2013, any claim for them now would be time-barred under s 6(1) of the Limitation Act 1953, for several years. There is no evidence that the firm had ever made any claim for payment on any of them, even the ones issued to the JC.

[25] So, even if the firm (and by extension the JD) was entitled to raise those bills as a counterclaim to the second JID — which I am of the view they are not — it would still not satisfy the requirement in s 3(1)(i) of having a counterclaim or set off or cross-demand equal to or exceeding the amount of the judgment debt.

[26] Thus, this ground too fails.

Ground 4: Since the first BN was ordered set aside by the Court of Appeal, whether the JC is estopped from issuing any further BN against the JD on the doctrine of res judicata

[27] The answer to this poser lies in the Court of Appeal decision of *Bank Pertanian Malaysia Bhd v Amir Firdaus bin Nordin* [2018] 5 MLJ 370; [2018] 8 CLJ 1, which involves a fact-situation very similar to ours.

[28] In that case, the judgment creditor obtained judgment against the judgment debtor guarantor and filed bankruptcy proceedings. When the Court of Appeal set aside the bankruptcy notice, the judgment creditor did not appeal. Instead, it filed a second bankruptcy notice against the judgment debtor. In response, the judgment debtor filed an application to set aside the second BN on the grounds that it was caught by the doctrine of res judicata.

[29] Tengku Maimum Tuan Mat JCA (as Her Ladyship then was) said:

> In any event, for the doctrine of res judicata to operate, it is trite that there must be adjudication by the court of the matters or issues raised in the earlier proceedings. There were absolutely no facts adverted to by the judgment debtor as to what exactly were the matters ventilated and adjudicated in the first BN such that the second BN is caught by the doctrine of res judicata. In other words, apart from the bare averment on res judicata, the judgment debtor did not apprise us as to what were the issues that had been finally determined in the first BN. However, it was apparent from the submission for the judgment creditor (which the judgment debtor did not deny) that in the first BN, the name of the judgment debtor was wrongly stated in the advertisement for substituted service.
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> The setting aside of the first BN on that issue cannot and does not amount to res judicata to estop the judgment creditor from filing the second BN when the judgment itself remains valid and unsatisfied. Neither can the filing of the second BN, upon setting aside of the first BN due to the mistake in the judgment debtor's name, be said to be an abuse of process of the court.

[30] Likewise, in our case, we have bare statements by both parties as to the reason why the Court of Appeal set aside the first BN, and they are not backed up by any documentary evidence. Indeed, the JD, bearing the burden of his allegation, failed to adduce any cause papers from what would have been his appeal.

[31] Even if he had, I would still hold that the doctrine of res judicata would not apply, because there was no adjudication on the merits of the bankruptcy action. Since the second JID remains valid and unsatisfied, the setting aside of the first BN would not amount to res judicata to estop the JC from filing the second BN.

[32] This ground too is rejected.

Ground 5: Rejection of JD's second affidavit (encl 13)

[33] I have read the JD's second affidavit (encl 13) and found that it more or less repeats and does not add anything to what the JD said in his first affidavit opposing the JC's affidavit (encl 7). So, even if the senior assistant registrar erred in rejecting it (and I am not saying he did, because he was entitled to use his discretion), that rejection was immaterial to his decision on the JC's application.

[34] Thus, this ground also fails.

Ground 6: Leave to commence bankruptcy proceedings

[35] For the JC's application, the JC is invoking O 77 r 5(4) of the Rules of Court 2012 and r 89(4) of the Insolvency Rules 2017.

[36] Order 77 r 5(4) of the Rules of Court 2012 provides:

> Where a party who has obtained a judgment or an order against a firm claims that a person is liable to satisfy the judgment or order as being a member of the firm, and the foregoing provisions of this rule do not apply in relation to that person, that part may apply to the Court *for leave to issue execution* against that person, the application to be made by notice of application which must be served personally on that person. (Emphasis added.)

[37] Rule 89(4) of the Insolvency Rules 2017 provides:

> In the case of a final judgment or final order against a partnership and if the individual partners were not served with the writ of summons in the suit in which the final judgment or final order was obtained, the final judgment or final order cannot be used to found a bankruptcy notice against a partner without leave of the court.

[38] In this case the JC had adduced proof in two letters from the Bar Council, dated 20 April 2021 and 30 April 2021 attesting to the JD being a partner or the sole proprietor of the firm. Suffice to say that he would thereby be liable for the second JID.

[39] That said, both O 77 r 5(4) of the Rules of Court 2012 and r 89(4) of the Insolvency Rules 2017 still required the JC to obtain leave of the court to pursue bankruptcy proceedings against him. And in the instant case, the JC filed the second BN and then applied for that leave.

[40] I would hold that in every case where the rules require leave to be obtained, that leave is mandatory. And it must be applied for and obtained first in time before the action for which leave is obtained is taken. There are several instances under the Rules of Court 2012 alone where leave is required, and there are decisions of our highest courts for each provision that have held that failing to first get leave is fatal.

[41] For example, O 46 r 2(1)(a) of the Rules requires leave of the court before a judgment creditor can issue a writ of execution on a judgment where six or more years has lapsed. In *Dr Shamsul Bahar bin Abdul Kadir v RHB Bank Bhd and another appeal* [2015] 4 MLJ 1; [2015] 4 CLJ 561, the Federal Court held that failure to obtain that leave was fatal.

[42] The JC relies on the cases of *Hong Leong Bank Bhd v Khairulnizam bin Jamaludin* [2016] 4 MLJ 302 and *Kasturi Kesveren a/l Balasamy v Rui Development Sdn Bhd* [2015] MLJU 1972; [2015] 4 CLJ 94 to overcome this. However, neither authority helps.

[43] *Hong Leong Bank v Khairulnizam* had nothing to do with either O 77 r 5(4) of the Rules of Court 2012 and r 89(4) of the Insolvency Rules 2017. It involved an application under s 5(3) of the Insolvency Act 1967, for leave to commence a bankruptcy action against a social guarantor.

[44] Like our case here, *Kasturi Kesveren* did involve leave to commence bankruptcy proceedings against a partner of a legal firm based on a sessions court judgment against the firm. However, the question before the court there was whether the application for leave should have been filed in the sessions court, where the judgment was obtained, or in the High Court which had exclusive jurisdiction over bankruptcy matters. In any event, SM Komathy JC (as Her Ladyship then was) did say:

> A judgment creditor must obtain leave from the High Court to institute bankruptcy proceedings against a partner of a firm.

[45] On this ground, the JD succeeds.

CONCLUSION

[46] I would therefore make an order:

(a) allowing the JD's appeal in encl 25;

(b) setting aside the SAR's decision of 7 February 2022; and

(c) dismissing the JC's application in encl 4.

[47] Consistent with the senior assistant registrar's decision on 7 February 2022 on costs in allowing the JC's application in encl 4, I make no order as to costs.

[48] I wish to again make it clear that the only reason I am making this order is because the JC should have first obtained leave before filing the second bankruptcy notice.

Appeal allowed.

Reported by Nabilah Syahida Abdullah Salleh